LANGKAWI R & D ACADEMY SDN BHD A

v.

KETUA SETIAUSAHA, KEMENTERIAN PERTAHANAN MALAYSIA & ORS B

COURT OF APPEAL, PUTRAJAYA
ABDUL MALIK ISHAK JCA
RAMLY ALI JCA
MOHAMED APANDI ALI JCA
[CIVIL APPEAL NO: W-01-467-2010] C
10 MARCH 2012

CIVIL PROCEDURE: *Trial - Mode of trial - Case resolved by way of written submissions - Whether parties concurred with mode adopted by judge - Whether an exercise of unfettered discretion by High Court Judge - Rules of the High Court 1980, O. 33 r. 2* D

CONTRACT: *Breach - Repudiatory breach - Failure to comply with terms of contract - Whether fundamental term of contract - Whether innocent party entitled to repudiate contract - Whether discharged from contract - Whether entitled to damages* E

The plaintiff/appellant entered into a contract with the Government of Malaysia ('government') wherein the government agreed to provide one unit RMAF F-5 fighter aircraft to the appellant and the latter agreed to carry out the avionics upgrade F and refurbishment of the aircraft as a flyable technology demonstrator. The flyable technology demonstrator was to be delivered to the government on or before 15 November 2001. During the commencement of the contract, the appellant was allowed access into TUDM Butterworth premises to carry out the G upgrading works. On 26 August 2002, the first defendant/first respondent terminated the contract on the grounds that: (i) the appellant failed to deliver the performance bond within 14 days from the date of the contract as provided in cl. 5.1 of the contract; and (ii) the appellant failed to deliver the flyable H technology demonstrator before 15 November 2001 as per cl. 7.3.2 of the contract. Dissatisfied, the appellant filed an action against the defendants/respondents and claimed damages for the unilateral termination of the contract based on the interpretation of several clauses set out in the contract. In the High Court, the I learned judge gave options to both parties of whether to determine the issues by way of a trial or written submissions or

decide that the paragraphs in the pleadings constituted non-issues. After analysing the pleadings, the appellant and the respondents agreed, upon directions by the learned High Court Judge, to file in their written submissions based on the documents agreed to by both parties. The appellant's claim was dismissed by the High Court and hence, the present appeal by the appellant. The appellant questioned the mode adopted by the learned High Court Judge in disposing of the case by not calling any witnesses and this was said to have prejudiced the appellant of a fair trial.

Held (dismissing appeal with costs)
Per Abdul Malik Ishak JCA delivering the judgment of the court:

(1) It is patently clear that O. 33 r. 2 of the Rules of the High Court 1980 is designed to save unnecessary costs and time in situations where it would be appropriate to resolve an issue in a cause or matter as a preliminary issue for the simple reason that its determination is likely to have the effect of substantially disposing of the cause or matter. On the facts of the instant case, the mode of trial by way of written submissions was determined by the learned High Court Judge with the concurrence of counsel from both sides. Hence, it was certainly unfair for the appellant to argue that the mode of the trial was imposed upon them. (para 15)

(2) Having agreed to the mode of the trial proposed by the learned High Court Judge, it was not open for the appellant to complaint as it would tantamount to defying the order of the High Court Judge. The appellant had lost before the High Court and they were resiling from what they had agreed and consented to (*Visia Finance Bhd v. Expert Credit & Leasing Sdn Bhd & Ors*; refd). (paras 18 & 19)

(3) The letter dated 12 May 2010 by the appellant, expressing dissatisfaction on the mode of trial, was written one month and six days after the learned High Court Judge had managed the case and gave directions on 6 April 2010 to both parties. If the appellant had insisted that witnesses should be called for the trial, it should be reflected in the notes of proceedings recorded on 6 April 2010. However, this was not done. Hence, the appellant was estopped from resiling. (paras 19 & 21)

(4) The learned High Court Judge did not err in fact and in law in dismissing the appellant's claim. The learned High Court Judge had given effect to the intention of the parties as reflected in cls. 7.3 and 7.3.2, *ie*, that the appellant should deliver to the government, one unit of flyable technology demonstrator on or before 15 November 2001. The terms of the contract was breached when the appellant failed to deliver the demonstrator to the government as per the contract and the failure gave the innocent parties, *ie*, the respondents, the right to repudiate the contract and consider themselves discharged therefrom and could even claim damages for the breach. (paras 31 & 37)

(5) The appellant's failure to provide the performance bond within 14 days from the date of contract fell on 25 October 2001, calculated from 11 October 2001 being the date of signing of the contract. Whereas the breach as to the delivery of the flyable technology demonstrator occurred on 15 November 2001. These breaches entitled the respondents to terminate the contract and to prevent the appellant access to the TUDM Butterworth premises. (para 45)

Bahasa Malaysia *Translation Of Headnotes*

Plaintif/perayu telah memasuki kontrak dengan Kerajaan Malaysia ('kerajaan') di mana kerajaan bersetuju untuk memberikan satu unit pesawat pejuang RMAF F-5 kepada perayu dan perayu bersetuju melakukan penaiktarafan avionik dan pembaharuan pesawat tersebut sebagai pendemonstrasi teknologi boleh terbang. Pendemonstrasi teknologi boleh terbang tersebut sepatutnya diserahkan kepada kerajaan pada atau sebelum 15 November 2001. Semasa permulaan kontrak, perayu dibenarkan menggunakan premis TUDM Butterworth untuk menjalankan kerja-kerja penaiktarafan. Pada 26 Ogos, 2002, defendan pertama/responden pertama telah membatalkan kontrak tersebut atas alasan bahawa: (i) perayu gagal menyerahkan bon pelaksanaan dalam tempoh 14 hari dari tarikh kontrak seperti yang diperuntukkan dalam kl. 5.1 kontrak; dan (ii) perayu gagal menyerahkan pendemonstrasi teknologi boleh terbang sebelum 15 November 2001 seperti dalam kl. 7.3.2 kontrak. Tidak berpuas hati, perayu memfailkan tindakan terhadap defendan-defendan/responden-responden dan memohon ganti rugi bagi penamatan kontrak sebelah pihak berdasarkan

kepada tafsiran beberapa klausa yang terdapat dalam kontrak. Di Mahkamah Tinggi, yang arif hakim memberikan pilihan kepada kedua-dua pihak sama ada hendak menentukan isu-isu melalui perbicaraan atau hujahan bertulis atau memutuskan bahawa perenggan-perenggan dalam pliding tidak membentuk isu. Selepas menganalisa pliding, perayu dan responden-responden bersetuju, atas arahan yang arif Hakim Mahkamah Tinggi, memfailkan hujahan bertulis mereka berdasarkan dokumen-dokumen yang dipersetujui kedua-dua pihak. Tuntutan perayu ditolak oleh Mahkamah Tinggi dan maka rayuan ini oleh perayu. Perayu mempersoalkan cara yang digunapakai oleh yang arif Hakim Mahkamah Tinggi dalam memutuskan kes dengan tidak memanggil saksi-saksi dan ini dikatakan telah memprejudis perayu daripada perbicaraan yang adil.

Diputuskan (menolak rayuan dengan kos)

Oleh Abdul Malik Ishak HMR menyampaikan penghakiman mahkamah:

(1) Adalah amat jelas bahawa A. 33 k. 2 Kaedah-Kaedah Mahkamah Tinggi 1980 dibentuk untuk menjimatkan kos yang tidak perlu dan dalam situasi yang mana wajar untuk memutuskan sesuatu isu di dalam kausa atau perkara sebagai isu awalan atas alasan mudah bahawa pemutusannya berkemungkinan mempunyai kesan memutuskan secara substansial kausa atau perkara tersebut. Di atas fakta kes ini, cara perbicaraan melalui hujahan bertulis telah diputuskan oleh yang arif Hakim Mahkamah Tinggi dengan persetujuan peguam kedua-dua pihak. Dengan itu, jelas tidak adil bagi perayu untuk menghujahkan cara perbicaraan telah dikenakan kepada mereka.

(2) Setelah bersetuju dengan cara perbicaraan yang dicadangkan oleh yang arif Hakim Mahkamah Tinggi, tidak terbuka untuk perayu mengadu kerana ia membawa maksud menentang perintah Hakim Mahkamah Tinggi. Perayu telah gagal di Mahkamah Tinggi dan mereka mengambul daripada apa yang telah mereka telah akui dan persetujui (*Visia Finance Bhd v. Expert Credit & Leasing Sdn Bhd & Ors*; dirujuk).

(3) Surat perayu bertarikh 12 Mei 2010, yang menyatakan ketidakpuasan hati cara perbicaraan, telah ditulis sebulan dan enam hari selepas yang arif Hakim Mahkamah Tinggi menguruskan kes dan memberikan arahan pada 6 April 2010 kepada kedua-dua pihak. Jika perayu telah mendesak bahawa

saksi-saksi sepatutnya dipanggil untuk perbicaraan, ia patut digambarkan dalam nota prosiding yang direkodkan pada 6 April 2010. Walau bagaimanapun, ia tidak dilakukan. Dengan itu, perayu diestop daripada mengambul.

(4) Hakim Mahkamah Tinggi tidak terkhilaf dari segi fakta dan undang-undang dalam menolak tuntutan perayu. Yang arif Hakim Mahkamah Tinggi telah memberikan kesan kepada niat pihak-pihak seperti yang digambarkan dalam kl. 7.3 dan 7.3.2 iaitu perayu sepatutnya menyerahkan kepada kerajaan, satu unit pendemonstrasi teknologi boleh terbang pada atau sebelum 15 November 2001. Terma-terma kontrak telah dimungkiri apabila perayu gagal menyerahkan pendemonstrasi tersebut kepada kerajaan seperti dalam kontrak dan kegagalan tersebut memberikan pihak yang tidak bersalah iaitu responden-responden, hak untuk membatalkan kontrak dan menganggap diri mereka dilepaskan daripadanya dan malahan boleh menuntut ganti rugi bagi kemungkiran tersebut.

(5) Kegagalan perayu memberikan bon pelaksanaan dalam tempoh 14 hari dari tarikh kontrak jatuh pada 25 Oktober 2001, dikira dari 11 Oktober 2001 iaitu tarikh kontrak ditandatangani. Manakala kemungkiran penyerahan pendemonstrasi teknologi boleh terbang berlaku pada 15 November 2001. Kemungkiran-kemungkiran ini memberikan hak kepada responden-responden menamatkan kontrak dan menghalang perayu akses kepada premis TUDM Butterworth.

Case(s) referred to:

Abdul Razak Datuk Abu Samah v. Shah Alam Properties Sdn Bhd & Another Appeal [1999] 3 CLJ 231 CA ***(refd)***

Aberfoyle Plantations Ltd v. Khaw Bian Cheng [1960] AC 115 PC ***(refd)***

Board of Trustees of the National Provident Fund v. Shortland Securities Ltd [1996] 1 NZLR 45 CA ***(refd)***

Charles Robert Leader And Henrietta Ada Leader v. George F Duffey And Amyatt Edmond Ray [1888] 13 App Cas 294 ***(refd)***

Chase Perdana Bhd v. Md Afendi Hamdan [2009] 6 CLJ 501 FC ***(refd)***

Dato' Abul Hasan Mohamed Rashid v. Multi-Code Electronics Industries Anor [2012] 1 LNS 258 CA ***(refd)***

Federal Insurance Co v. Nakano Singapore (Pte) Ltd [1992] 1 SLR 390 ***(refd)***

Head v. Tattersall [1871] LR 7 Ex 7 ***(refd)***

Krishnan Rajan N Krishnan v. Bank Negara Malaysia & Ors [2003] 1 CLJ 388 HC ***(refd)***

M & J Frozen Food Sdn Bhd & Anor v. Siland Sdn Bhd & Anor [1994] 2 CLJ 14 SC ***(refd)***

A *National Land Finance Co-operative Society Ltd v. Sharidal Sdn Bhd [1983] 2 CLJ 76; [1983] CLJ (Rep) 282 FC* ***(refd)***
Progressive Insurance Bhd v. Pile Force Sdn Bhd & Ors [2005] 8 CLJ 559 HC ***(refd)***
Tan Chong & Sons Motor Company (Sdn) Berhad v. Alan McKnight [1983] 1 CLJ 77; [1983] CLJ (Rep) 394 FC ***(refd)***
B *Trans Trust SPRL v. Danubian Trading Co Ld [1952] 2 QB 297 CA* ***(refd)***
Toll (FGCT) Pty Limited v. Alphapharm Pty Limited And Others [2004] 219 CLR 165 ***(refd)***
Visia Finance Bhd v. Expert Credit & Leasing Sdn Bhd & Ors [1998] 2 CLJ 845 CA ***(refd)***

C **Legislation referred to:**
Rules of the High Court 1980, O. 33 rr. 2, 3(1), O. 34

For the plaintiff/appellant - M Manogar; M/s Manogar & Co
For the respondent/defendants - Nik Mohd Noor Nik Kar (Nurhafizza Azizan
D *with him); SFC*

[Appeal from High Court, Kuala Lumpur; Civil Suit No: S1-21-217-2005]

Reported by S Barathi

E

JUDGMENT

Abdul Malik Ishak JCA:

F **[1]** This is the judgment of this court.

[2] The memorandum of appeal filed by plaintiff appellant questioned the mode adopted by the learned High Court Judge in disposing of the case by not calling any witnesses and this was
G said to have prejudiced the plaintiff appellant of a fair trial. The hearing of the case was set for three days beginning from 6 April 2010 to 8 April 2010. But on the first day of the trial, and that would be on 6 April 2010, the learned High Court Judge conducted a case management and instructed counsel on both
H sides to examine and analyse the pleadings paragraph by paragraph in order to determine the issues to be tried.

[3] On 6 April 2010, three options were given by the learned High Court Judge to counsel on both sides to select after perusing through the paragraphs of the pleadings whether to determine the
I issues by way of a trial or by way of written submissions or decide that the paragraphs in the pleadings constituted non-issues.

The three options can be seen in the notes of proceedings dated 6 April 2010 at pp. 97 to 98 of the appeal record at jilid 2, bahagian "B" and they may be stated as follows:

(i) "X" refers to a non-issue; or

(ii) "T" refers to a trial where witnesses will be called; or

(iii) "S" refers to a submission.

[4] The appeal record for the session on 6 April 2010 at jilid 2, bahagian "B" is self explanatory. It shows that the learned High Court Judge had given ample opportunities to counsel on both sides to decide and determine the options accorded to them. The learned High Court Judge went through a meticulous process of examining every paragraph in the pleadings with active participation of counsel on both sides in order to ensure that all the paragraphs were read before the options were exercised.

[5] After completing the rigmarole of analysing the pleadings, the plaintiff appellant and the defendants respondents agreed that there were no paragraphs in the pleadings that needed to be determined by way of a trial. In fact, the parties agreed as follows:

(i) that paras. 3, 6, 7, 12 to 24, 26 to 34, 36 to 46 and 49 to 52 in the statement of claim were issues that should be determined by the learned High Court Judge by way of submissions; and

(ii) that the rest of the paragraphs in the statement of claim were not in dispute.

[6] It must be emphasised that after the pleadings were vigorously analysed, the plaintiff appellant did not at any time state that they did not agree to the resolutions arrived at by the learned High Court Judge. Indeed both parties were co-operative and they agreed, upon directions by the learned High Court Judge, to file in their written submissions based on the documents agreed to by both parties.

[7] The exchanges between counsel on both sides with the learned High Court Judge as seen at pp. 122 to 123 of the appeal record at jilid 2, bahagian "B" are now reproduced and they show the cooperation accorded to the learned High Court Judge:

Manogar : I'm wondering, My Lord, I don't see a 'T' here
(Laughter from the Court).

Noramilia : Exactly.

Manogar : So what happens to this?

Judge : That's right. That's why I asked the question, whose bright idea was to ask for 3 days?

Manogar : So what happens to this?

Manogar : I remain guided by – I suppose we remain guided by the 3 circles. What happens next?

Judge : Alright, so we don't have a 'T', so we only have 'S' – right?

Manogar : 'S', yes, My Lord.

Noramilia : Yes, Yang Arif.

[8] And at p. 127 of the appeal record at jilid 2, bahagian "B", the transcript shows the following exchange:

Manogar : Another point, My Lord, just wish to clarify. The witness statements filed has been marked. So would it be part of the – what happens to those – just to ignore them?

Judge : Ya, they have to be ignored. They were completely unnecessary – right?

Manogar : OK.

[9] Mr Manogar was very accomodating and pleasant towards the learned High Court Judge. But before us, he submitted that "never at any time during the unwarranted analysis of pleadings done on the morning of 6 April 2010 did counsel for the appellant agree that there is no need for witnesses to be heard" (see the written submission of the plaintiff appellant's solicitor at pp. 2 to 3).

[10] It is germane, at this juncture, to refer to O. 33 r. 2 of the Rules of the High Court 1980 ("RHC"). It reads as follows:

> 2 Time, etc, of trial of questions or issues (O 33 r 2)
>
> The Court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated.

[11] Chan Sek Keong J (now Chief Justice of Singapore) in *Federal Insurance Co v. Nakano Singapore (Pte) Ltd* [1992] 1 SLR 390, at p. 397, speaking for the Court of Appeal of Singapore aptly said:

> ... we may state as a general rule that the court will not exercise its power under Order 33 rule 2 to order a preliminary point of law to be tried, whether or not that point involves the prior determination of factual disputes affecting that point, unless the trial of that issue will result in a substantial saving of time and expenditure in respect of the trial of the action as a whole (including any counterclaim).

[12] Abdul Malik bin Ishak J (now JCA) in *Krishnan Rajan N Krishnan v. Bank Negara Malaysia & Ors* [2003] 1 CLJ 388 p. 392; [2003] 1 MLJ 149, at p. 154, interpreted O. 33 r. 2 of the RHC in these salient words:

> The principles of law that can be distilled from the long line of established authorities may conveniently be marshalled in these terms:
>
> (i) that the rule confers upon the court a wide discretionary power to order any question or issue in a cause or matter, whether of fact or law or partly of fact and partly of law, to be tried before, at or after the trial of the cause or matter;
>
> (ii) that the application under Order 33 rule 2 of the RHC may not be appropriate where the facts are in dispute or where extrinsic evidence is required to be adduced;
>
> (iii) that the overriding consideration, when taken in its correct perspective, is whether the application would result in a substantial saving of time and expenditure; and
>
> (iv) that the court should be wary and warn itself against the abuse of this process.

[13] It is patently clear that O. 33 r. 2 of the RHC is designed to save unnecessary costs and time in situations where it would be appropriate to resolve an issue in a cause or matter as a preliminary issue for the simple reason that its determination is likely to have the effect of substantially disposing of the cause or matter. Here, the learned High Court Judge in deciding the cause or matter gave directions that the parties filed written submissions instead of calling witnesses to testify after His

Lordship conducted an intensive paragraph by paragraph analysis of the pleadings with the participation of counsel from both sides. It is an unfettered exercise of discretion by the learned High Court Judge and we see nothing wrong with such an approach.

[14] It is also ideal to refer to O. 33 r. 3 of the RHC. It is worded as follows:

> 3 Determining the mode of trial (O 33 r 3)
>
> (1) In every action begun by writ, an order made on the summons for directions shall determine the mode of the trial; and any such order may be varied by a subsequent order of the Court made at or before the trial.
>
> (2) In any such action different questions or issues may be ordered to be tried by different modes of trial and one or more questions or issues may be ordered to be tried before the others.
>
> (3) The references in this Order to the summons for directions include references to any summons or application to which, under any of these rules, Order 25 rules 2 to 7 are to apply, with or without modifications.

[15] Now, O. 33 r. 3(1) of the RHC stipulates for the mode of the trial to be determined by the trial court. Here, the mode of the trial by way of written submissions was determined by the learned High Court Judge with the concurrence of counsel from both sides. To put it in another way, both the parties had willingly consented to the mode of the trial proposed by the learned High Court Judge. It is certainly unfair for the plaintiff appellant to argue before us that the mode of the trial was imposed upon them. The notes of proceedings for the session on 6 April 2010, as reflected at pp. 90 to 128 of the appeal record at jilid 2, bahagian "B" bear testimony to the fact that counsel from both sides did not object to the process of analysing all the paragraphs in the pleadings by the learned High Court Judge before His Lordship decided the mode of the trial for the case by way of written submissions. It is too late in the day for learned counsel for the plaintiff appellant to complain before us now.

[16] Order 34 of the RHC envisages the need for speedy disposal of the case. And this is equally applicable to this appeal. Abdul Malik bin Ishak JCA in *Dato' Abul Hasan Mohamed Rashid v. Multi-Code Electronics Industries Anor* [2012] 1 LNS 258; [2012] 2 MLRA 613, at p. 618 aptly said:

> (20) We would like to make an observation that Order 34 of the RHC calls for not only the expeditious and economical despatch of the case, it also calls for the just disposal of the suit.

[17] The learned High Court Judge had also ordered both parties to submit their written submissions after His Lordship was satisfied that both parties consented to the mode of the trial as proposed by His Lordship. Pursuant to His Lordship's directions, on 30 April 2010, the defendants respondents filed their written submissions. On 24 June 2010, the plaintiff appellant also filed its written submission. By way of a response, on 2 July 2010, the defendants respondents filed their submissions in reply.

[18] It is apparent from the recital of the chronology of events, both parties agreed to the mode of the trial proposed by the learned High Court Judge. At this appellate stage, it is not open to the plaintiff appellant to complain. Such a complaint is tantamount to defying the order of the learned High Court Judge. In this context, it is ideal to refer to the case of *Visia Finance Bhd v. Expert Credit & Leasing Sdn Bhd & Ors* [1998] 2 CLJ 845, a decision of this court. Mahadev Shanker JCA (as he then was) speaking for this court, in that case, had this to say at p. 854 of the report:

> Here both counsel had consented to proceed in a particular way. An order made by consent in the absence of fraud, can only be varied by consent. It would be a denial of justice to permit a party to resile from what his counsel decided for him merely because he lost.

[19] Likewise here, the plaintiff appellant lost before the High Court and they are now resiling from what they had agreed and consented to.

[20] Another case in point would be that of *Progressive Insurance Bhd v. Pile Force Sdn Bhd & Ors* [2005] 8 CLJ 559, a decision of Vincent Ng J (later JCA). In that case, the parties disclosed to the court that they have agreed to appoint a private handwriting expert. And they made known to the court that they agreed to

be bound by the result of the examination conducted by a private handwriting expert and resolve the suit with finality. The agreement was that, if the expert report was in the second and fourth defendants' favour, the plaintiff's claim would be dismissed and the second defendant's counterclaim would be allowed. But, if the expert report was in the plaintiff's favour, then the plaintiff's claim ought to be allowed and the said counterclaim would be dismissed. Thus, an order by consent of all the parties were entered and the documents were then returned to the parties for further action. On the case management date of 25 November 2004, the court was informed that the appointed handwriting expert had prepared his report. The expert certified that the handwriting on the documents were genuine and true signature of the fourth defendant. Based on the parties prior agreement on the mode of case disposal, Vincent Ng J (later JCA) entered judgment for the plaintiff as prayed in prayers (a) to (c) of enclosure one (1) and dismissed the second defendant's counterclaim. Aggrieved, the second defendant filed an appeal to the Court of Appeal. The second defendant also filed a summons in chambers in encl. 91, *inter alia*, to set aside and to stay execution of Vincent Ng J's (later JCA's) judgment. At p. 564 of the report, Vincent Ng J (later JCA) had this to say:

> Thus, after considering my recorded notes and all the facts and circumstances which led to the said consent order, it is very clear that the 2nd defendant was minded to raise the issue that he was not to be bound by the consent order only after the parties had secured the finding of the private handwriting expert which was not in his favour. This conduct on the part of the 2nd defendant is wholly unbecoming and reprehensible as, had the private handwriting expert's finding been adverse to the plaintiff's case, I am sure the 2nd defendant would have been happy to be bound by the finding and insist that the plaintiff's claim be dismissed with costs and judgment be entered on his counter-claim.

[21] In regard to the letter written by the plaintiff appellant's counsel dated 12 May 2010 addressed to the registrar, High Court of Kuala Lumpur and to the secretary to the judge, High Court Civil 6 of Kuala Lumpur and copied to the Senior Federal Counsel, Puan Noramilia, of the Attorney-General's Chambers as well as to the plaintiff appellant expressing dissatisfaction that the mode of the trial was to be conducted by way of written submissions of both parties, we have this to say. With respect, the letter dated 12 May 2010 was written one month and six days after the learned High Court Judge had managed the case and

gave directions on 6 April 2010 to both parties. If learned counsel for the plaintiff appellant insisted that witnesses should be called for the trial, it should be reflected in the notes of proceedings recorded on 6 April 2010. But this was not so. Having consented to dispose of the case by way of written submissions, learned counsel for the plaintiff appellant is estopped from resiling.

[22] Once again, we will reproduce segments of the notes of proceedings for the session dated 6 April 2010 as seen at pp. 119, 120 and 121 of the appeal record at jilid 2, bahagian "B" that will support the assertions that the plaintiff appellant's counsel agreed to the mode of tendering written submissions to dispose of the whole case. For starters, we will refer to p. 119, it reads as follows:

Manogar : For the Plaintiff, My Lord, it's enough to show that the Defendant admits receiving the letter dated 1.7.2005.

Judge : So you will then just leave it to submissions now?

Manogar : Yes. Yes. We just want to establish the letter was sent and received.

Judge : Alright.

Manogar : So we'll submit.

Judge : Alright, and Federal Counsel?

Noramilia : Yes, Yang Arif.

Judge : So we just put an 'S' in the circle.

47, 48 and 49 – to be honest when I read them and right now also I don't know what to make of it.

Manogar : No issue, My Lord, nothing to submit also on that.

Judge : That's right.

Noramilia : 'X'.

Manogar : 'X'.

[23] Next, we refer to pp. 120 to 121. They read as follows:

Manogar : A.

Judge : Also claim damages for this 432 million?

Manogar : Yes, because the contract mentions that after the first aircraft job is done then the contract allows for another 9 aircrafts – a future contract it costs 22.

Judge : Alright, so that's your basis for this amount – alright.

Manogar : That's the amount (of our) basis, yes.

Judge : So then it is a matter of submissions – right?

Noramilia : Yes.

Manogar : Yes.

Judge : And Federal Counsel, you agree it's a matter of submissions. Alright, circle with an 'S'. Paragraph 51.

Manogar : Paragraph 51, My Lord, it's more on submission of the law.

Judge : It's all submissions, isn't it?

Manogar : Yes, whether they are entitled to.

[24] In regard to the merits of the case, we will now set out the brief facts in this way. On 11 October 2001, the plaintiff appellant entered into a contract with the Government of Malaysia wherein the Government of Malaysia agrees to provide one unit RMAF F-5 fighter aircraft to the plaintiff appellant and the latter agrees to carry out the avionics upgrade and refurbishment of the said aircraft as a flyable technology demonstrator in accordance with the contract *vide* KP/PERO-3/U/A/4/2001. The flyable technology demonstrator was to be delivered to the Government of Malaysia on or before 15 November 2001. The plaintiff appellant agreed to upgrade and refurbish the said aircraft without being paid and upon the plaintiff appellant's successful delivery of the flyable technology demonstrator, the plaintiff appellant was entitled to ten years future contract.

[25] Prior to the contract, there was a letter of acceptance signed by both parties dated 12 July 2001 and this letter of acceptance stipulated that the plaintiff appellant was obliged to deliver the flyable technology demonstrator during the LIMA 2001 show held in Langkawi. But the plaintiff appellant failed to deliver the flyable technology demonstrator on the scheduled date.

[26] The plaintiff appellant used the expertise of Caledonian Airborne Systems Limited ("Cas Ltd") a company incorporated in Scotland, to assist the plaintiff appellant to carry out avionics upgrade works on the said aircraft and this is within the knowledge of all the defendants respondents and it is also in compliance with cl. 19 of the contract. To foster relationship with Cas Ltd, the plaintiff appellant signed a sub-contract with Cas Ltd. However, on 7 February 2002, the plaintiff appellant informed the defendants respondents that the plaintiff appellant had terminated its sub-contract with Cas Ltd.

[27] During the commencement of the contract, the plaintiff appellant was allowed access into TUDM Butterworth premises to carry out the upgrading works on the said aircraft. But when the defendants respondents awarded the said works to Cas Ltd, the plaintiff appellant was prohibited from entering the TUDM Butterworth premises.

[28] The first defendant respondent terminated the contract on 26 August 2002 (see pp. 472 to 473 of the appeal record at jilid 2, bahagian "C") and on 6 September 2002 (see pp. 384 to 385 of the appeal record at jilid 2, bahagian "C") on the grounds that the plaintiff appellant failed to deliver the performance bond and also failed to the deliver flyable technology demonstrator on or before 15 November 2001.

[29] The plaintiff appellant claimed damages for the unilateral termination of the contract based on the interpretation of several clauses set out in the contract itself. The English language translation of the statement of claim itemised the claims of the plaintiff appellant in this fashion:

> 49. The plaintiff here claims damages as a result of the unilateral and invalid termination of the said contract for a sum of RM48 million.
>
> 50. The plaintiff also claims damages for RM432 million for loss of future contract as per clause 22 of the said contract.
>
> 51. The plaintiff also claims exemplary damages from the third defendant due to the oppressive conduct of the first and second defendants.
>
> 52. The plaintiff also prays for interest and costs of this action. Wherefore the plaintiff prays for judgment as follows:
>
> (a) RM48 million as damages;

(b) RM432 million as damages and future loss of contract;

(c) exemplary damages;

(d) interest on the total judgment sum at 8% per annum from 1.7.2005 until full settlement;

(e) costs of this action; and

(f) other necessary and ancillary orders as relief deemed fit and appropriate by this Honourable Court.

[30] The termination letters dated 26 August 2002 and 6 September 2002 reflected the defence relied upon by the defendants respondents, namely:

(i) failed to provide the performance bond within 14 days from the date of the contract as provided for in cl. 5.1 of the contract; and

(ii) failed to deliver one unit flyable technology demonstrator before 15 November 2001 as provided for in cl. 7.3.2 of the contract.

[31] The learned High Court Judge did not err in fact and in law in dismissing the plaintiff appellant's claim. His Lordship examined the clauses in the contract and arrived at a just decision. Clause 7.3 and cl. 7.3.2 of the contract must be read together. It stipulates that the plaintiff appellant shall deliver to the Government one unit of flyable technology demonstrator on or before 15 November 2001. This is the intention of the parties and the learned High Court Judge has given effect to it. It is often said that the "intention of the parties" reflects the true meaning of the contract. In *Toll (FGCT) Pty Limited v. Alphapharm Pty Limited And Others* [2004] 219 CLR 165, the High Court of Australia held that (see p. 179):

> References to the common intention of the parties to a contract are to be understood as referring to what a reasonable person would understand by the language in which the parties have expressed their agreement. The meaning of the terms of a contractual document is to be determined by what a reasonable person would have understood them to mean. That, normally, requires consideration not only of the text but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction (*Pacific Carriers Ltd v. BNP Paribas* [2004] 218 CLR 451 at 461-462).

[32] The New Zealand Court of Appeal in *Board of Trustees of the National Provident Fund v. Shortland Securities Ltd* [1996] 1 NZLR 45, CA aptly said at p. 50: A

> The parties, particularly knowledgeable and experienced parties, legally advised, are to be taken to have intended what they have said. B

[33] The meaning of the contract between the parties must be ascertained from the language the parties have used, and particular attention must be paid to the commercial purpose of the contract. Lord Halsbury LC in *Charles Robert Leader And Henrietta Ada Leader v. George F Duffey And Amyatt Edmond Ray* [1888] 13 App Cas 294 succinctly said at p. 301: C

> But I agree that you must look at the whole instrument, and, inasmuch as there may be inaccuracy and inconsistency, you must, if you can, ascertain what is the meaning of the instrument taken as a whole in order to give effect, if it be possible to do so, to the intention of the framer of it. D

[34] The learned High Court Judge did just that when his Lordship said in his written grounds of judgment at pp. 36 to 39 of the appeal record that: E

> (29) The terms are mandatory. Since it is not the Plaintiff's pleaded case that a Flyable Technology Demonstrator was in fact completed by 15.11.2001, there was on the face of it a breach of Clause 7.3.2 by the Plaintiff. F
>
> (30) The relevant question that arises is whether the breach is material?
>
> (31) It is observed that the delivery of the Flyable Technology Demonstrator was both a condition for payment under Clause 4.2 as well as a pre-condition before entering into a contract for nine further units between 15.6.01 until 14.6.11. Indeed the opening statement for the Plaintiff said: G
>
> > The said agreement is for the Plaintiff to prepare one unit of a Technology Demonstrator for the Defendants and thereafter the Plaintiff and the Defendants would enter into an agreement for another 9 units F5-F aircraft. The future contract is dependent upon the willingness of the Plaintiff delivering one Technology Demonstrator aircraft under the said agreement. There are no other conditions for the future contract in respect of the 9 units F5-F aircraft. H I

(32) Clause 4 as to scope of contract between the parties requires the Plaintiff to upgrade the aircraft in accordance with OEM standard on system/component listed in Schedule 1, ground and air functional tests in accordance with OEM test protocol and certification of the aircraft prior to it being flight tested by RMAF pilot. The terms 'upgrade' and 'aircraft' in the clause were specifically defined in Clause 1. In particular, 'upgrade' was defined as 'Means the designing of a new/better aircraft related system as compared to current system, manufacturing and/or fabrication of the designed system, bench and system integration test, removal of the existing system, installation and integration of the new system to the Aircraft, ground and air functional test of the system in accordance with the original equipment and/or aircraft manufacturer (OEM) test protocol.

(33) Clause 4.2 upon which the Plaintiff relies for its claim of RM48 million damages provides:

> 4.2 After successful completion of the avionics upgrade and refurbishment of the technology demonstrator and subject to the acceptance by the government, a monthly payment of the aircraft to a value of not more than Ringgit Malaysia Four Hundred Thousand (RM400,000.00) only being proportionate of Ringgit Malaysia Twenty Thousand (RM20,000.00) per hour and a maximum of twenty (20) hours per month be paid by the GOVERNMENT to the Company for a maximum period of ten (10) years.

(34) On the face of it, the scope of contract is extensive and payment commences after successful completion of the avionics upgrade and refurbishment of the Technology Demonstrator. Even so, and although the agreement was signed on 11.10.2001, it carried as a condition the delivery of the Technology Demonstrator by 15.11.2001. Given that the parties are no novices, the condition can only be a term of the contract that is (a) uppermost in the minds of the Defendants as a condition, and (b) representation by the Plaintiff as their commitment and ability to demonstrate their capability and technical expertise.

[35] Continuing at p. 40 of the appeal record, the learned High Court Judge had this to say in his written grounds of judgment:

(37) Hence, not only was there a material breach of the contract between the parties in respect of the agreement relating to the Technology Demonstrator and warranting its termination, but also there was breach of the pre-condition to entering

into contracts for further 9 aircrafts. After the breach, there remained no valid obligation to enter into any contract for the further 9 aircrafts.

[36] It is mandatory on the part of the plaintiff appellant to deliver to the Government one unit of flyable technology demonstrator on or before 15 November 2001 and this was not done. To compound the matter further, the opening statement of the plaintiff appellant as alluded to by the learned High Court Judge makes it a condition precedent to deliver one unit of flyable technology demonstrator on or before the scheduled date before the future contract in respect of the nine units of RMAF F-5 fighter aircrafts is activated.

[37] The term of the contract has been breached when the plaintiff appellant failed to deliver one unit of flyable technology demonstrator on or before 15 November 2001 to the Government and such failure gives the innocent parties - the defendant respondents herein, the right to repudiate the contract and consider themselves discharged therefrom and could even claim damages for the breach (*Tan Chong & Sons Motor Company (Sdn) Berhad v. Alan McKnight* [1983] 1 CLJ 77; [1983] CLJ (Rep) 394; [1983] 1 MLJ 220, FC; and *Abdul Razak Datuk Abu Samah v. Shah Alam Properties Sdn Bhd & Another Appeal* [1999] 3 CLJ 231; [1999] 2 MLJ 500, CA).

[38] It cannot be denied that the term that has been flouted is fundamental to the contract and the innocent parties are entitled, under the law, to treat themselves as being discharged and sue for damages. This is the law and this is the scenario in this appeal before us.

[39] On conditions precedent, the learned High Court Judge referred to the following authorities:

(a) *Aberfoyle Plantations Ltd v. Khaw Bian Cheng* [1960] AC 115, PC.

(b) *National Land Finance Co-operative Society Ltd v. Sharidal Sdn Bhd* [1983] 2 CLJ 76; [1983] CLJ (Rep) 282, FC.

(c) *M & J Frozen Food Sdn Bhd & Anor v. Siland Sdn Bhd & Anor* [1994] 2 CLJ 14, 56, SC.

(d) *Chase Perdana Bhd v. Md Afendi Hamdan* [2009] 6 CLJ 501, FC.

[40] A contract is subject to a condition precedent when the contract is not binding unless or until a specified event occurs. Thus, where the condition is precedent, the agreement is not fully binding until the event occurs. The non-fulfilment of a condition precedent will result in the contract being discharged, either automatically or at the election of one of the parties.

[41] Delivering one unit of flyable technology demonstrator on or before the scheduled date is a condition precedent which must be fulfilled before any contract is concluded at all. And it was not fulfilled.

[42] Two authorities will now be referred to. The first is the case of *Head v. Tattersall* [1871] LR 7 Ex 7. That was a case where a horse was sold on the basis that it had been hunted with the Bicester hounds. It was expressly stated by the seller that if it had not been so hunted the buyer could return it by 5pm on the following Wednesday. Before that time arrived, the horse was injured and the buyer discovered that it had not been hunted with the Bicester hounds. The buyer had not been at fault with regard to the injury to the horse. It was held that the buyer could return the horse, despite its injury, because it had not been hunted with the Bicester hounds.

[43] The second is the case of *Trans Trust SPRL v. Danubian Trading Co Ld* [1952] 2 QB 297, 304, CA. That case concerned a contract for the sale of one thousand tons of rolled steel. There was an obligation on the buyer to open a confirmed letter of credit to pay for the steel. It was necessary that the buyer should open the letter of credit before the seller became liable to deliver. It was known to both parties that the seller could not obtain the goods until the letter of credit was opened. The obligation to open the letter of credit was construed as a condition precedent to the seller's obligation to deliver. And it was held that the seller did not have to perform until the buyer had done so.

[44] In regard to the performance bond, at p. 42 of the appeal record, the learned High Court Judge had this to say in his written grounds of judgment:

> (39) Similarly, it was not pleaded that any such Performance Bond had been delivered at any time. As the obligation was to maintain it at 5% at all times, topping it up in the event of any claims, it is an important obligation. The Plaintiff was, therefore,

in breach of Clause 5.1., and breach of it is not inconsequential when the nature of the breach is in not submitting any Performance Bond at all.

[45] The failure on the part of the plaintiff appellant to provide the performance bond within 14 days from the date of the contract must necessarily fall on 25 October 2001 - calculated from 11 October 2001 being the date of signing of the contract. Whereas the breach as to the delivery of one (1) unit of flyable technology demonstrator occurred on 15 November 2001. These breaches entitled the defendants respondents to terminate the contract and to prevent the plaintiff appellant access to the TUDM Butterworth premises.

[46] For these reasons, we unanimously dismissed the appeal of the plaintiff appellant with costs of RM15,000. We affirmed the decision of the learned High Court Judge. Deposit should rightly go to the defendants respondents.